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Wills -- Posthumous Continuation of Undue Influence

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These rules are laid down as being separate and distinct, but it must be observed that in practice both principles are frequently involved in the same case and often, as in the leading case of *United States v. Lee*,[21] the determination of whether or not the state has an interest in the outcome of the suit will incidentally also determine the question of the officer's authority. Thus, in the principal case, not only has the United States an interest in the suit, but also a decree forcing Farley to reïnstate the contract would involve the difficulties attendant upon the supervision of an official's performance of his duties.

Were the rules governing these cases otherwise, there would be opened an opportunity for an interference with governmental functions which would put the good of a private individual above the general welfare. Just when this is not true is a question of policy best determined, as it has been, by Congress which has, in general, provided adequate relief in case where the injury is the result of a breach of contract.

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Wills—Posthumous Continuation of Undue Influence.

In a will contest, caveators offered evidence of undue influence alleged to have been exerted by testator's wife, and proponents objected on the ground that the contested codicils were executed eight days and ninety-eight days respectively after her death. *Held,* in contemplation of law, undue influence does not necessarily cease with the death of the person alleged to have exercised it. Judgment for caveators sustained.[1]

It is well established that influence alleged to be undue need not be physical force but may be, and, in fact, more often is some more subtle power which operates only on the mind of the testator.[2] No overt acts of any kind need be exercised at the exact time of the execution of the will,[3] nor is there any fixed time limit as to the admissibility of acts committed previously.[4] Questions of remoteness are largely within

[21] 106 U. S. 196, 1 Sup. Ct. 240, 27 L. ed. 171 (1882).

[1] Trust Co. v. Ivey, 178 Ga. 629, 173 S. E. 648 (1934).

Only one American and one English case have been found in point, and both are in accord with the principal case. Penniston v. Kerrigan, 159 Ga. 345, 125 S. E. 795 (1924) (death preceded testamentary act by approximately eight months); Radford v. Risdon, 28 T. L. R. 342, 55 Sol. Jo. 416 (Pros. Div., and Adm. Div., 1912) (death preceded testamentary act by eleven days).

[2] *In re* Hinton's Will, 180 N. C. 206, 104 S. E. 341 (1920); Marx v. McGlynn, 88 N. Y. 357 (1882); *In re* Brunor's Will, 43 N. Y. S. 1141, 19 Misc. Rep. 203 (1896); ROOD, WILLS (2d ed. 1926) §§175, 176; 1 SCHOULER, WILLS, EXECUTORS AND ADMINISTRATORS (5th ed. 1915) §§228, 229.

[3] Shepardson v. Potter, 53 Mich. 106, 18 N. W. 575 (1884); Mowry v. Norman, 204 Mo. 173, 103 S. W. 15 (1907); Gott v. Dennis, 296 Mo. 66, 246 S. W. 218 (1922); Kaechelen v. Barringer, 19 S. W. (2d) 1033 (Mo. App. 1929); 1 PAGE, WILLS (2d ed. 1926) §194.

[4] Huffman v. Groves, 245 Ill. 440, 92 N. E. 289 (1910).

the discretion of the trial court,[5] and if contestant can show a continuation of the effect on the mind of the testator, it seems immaterial when the acts themselves were committed.[6] The person alleged to have exerted undue influence need not have been present at the execution of the will,[7] nor need he have had a beneficial interest thereunder;[8] and since neither the time element nor the manner of exerting influence would bar a contestant from alleging the undue influence of one living at the time but removed from the scene of the making of the will, the only problem left in distinguishing between the influence of a deceased person and one merely absent, seems to be in the matter of proof of its continued operation on the mind of the testator. This is a question of fact which should be submitted to the jury,[9] unless, of course, the court finds that the evidence calls for a directed verdict.

In cases of this kind, even more than in ordinary will contests, special consideration should be given to evidence of the relationship of the parties and the relative power of resistance of the testator. A careful distinction should also be made between that influence which threatens the testator's physical comfort and safety and that which prejudices his mind. For example, the alleged influence in the principal case, which consisted mainly of threats by the testator's wife to commit suicide, or to do him bodily harm, or to harass and annoy him, seems to be such

[5] *In re* Everett's Will, 105 Vt. 291, 166 Atl. 827 (1933). Evidence of acts alleged in the following cases was excluded as "too remote": *In re* Chisholm's Will, 93 Vt. 453, 108 Atl. 393 (1919) (twenty years); Vannest v. Murphey, 135 Iowa 123, 112 N. W. 236 (1907) (eighteen years); *In re* Shell's Estate, 28 Colo. 167, 63 Pac. 413 (1900) (sixteen years); Ketchum v. Stearns, 76 Mo. 396 (1882) (eleven years); Batchelders v. Batchelders, 139 Mass. 12, 29 N. E. 61 (1885) (eight or nine years, "entirely too remote"); Davidson's Ex'r v. Melton, 223 Ky. 145, 3 S. W. (2d) 198 (1928) (eight years); Floto v. Floto, 233 Ill. 605, 84 N. E. 712 (1908) (seven years); Bunyard v. McElroy Ex'r., 21 Ala. 311 (1852) (six years); Old Colony Trust Co. v. Di Cola, 233 Mass. 119, 123 N. E. 454 (1919) (six years); Sullivan v. Brabazon, 264 Mass. 276, 162 N. E. 312 (1928) (two years); Eckert v. Flowry, 43 Pa. St. 46 (1862) (one year).

But acts alleged in the following cases were admitted in evidence: Smith's Ex'r v. Smith, 67 Vt. 443, 32 Atl. 255 (1895) (six weeks); Loree v. Vedder, 158 Mich. 372, 122 N. W. 623 (1909) (six years); Powers Ex'r v. Powers, 25 Ky. L. 1468, 78 S. W. 152 (1904) (undue influence vitiating a previous will held available to defeat a similar will executed approximately fifteen years later).

[6] Dunnaway v. Smoot, 23 Ky. L. 2289, 67 S. W. 62 (1902) ("immaterial" when exerted); Shepardson v. Potter, 53 Mich. 106, 18 N. W. 575 (1884) (may be exerted "previously"); *In re* Everett's Will, 105 Vt. 291, 166 Atl. 827 (1933) (available "whenever exerted, whether months or years before").

[7] *In re* Richardson's Will, 199 Iowa 1320, 202 N. W. 114 (1925); Worth v. Pierson, 208 Iowa 353, 223 N. W. 752 (1929); Mowry v. Norman, 204 Mo. 173, 103 S. W. 15 (1907); I PAGE, WILLS §193.

[8] *In re* Cahill, 74 Cal. 52, 15 Pac. 364 (1887); Vanvalkenberg v. Vanvalkenberg, 90 Ind. 433 (1883); Gott v. Dennis, 296 Mo. 66, 246 S. W. 218 (1922); 1 PAGE, WILLS §193; 1 JARMAN, WILLS (6th ed. 1893) p. 68. But *cf.* Stutivilles Ex'rs. v. Wheeler, 187 Ky. 361, 291 S. W. 411 (1927).

[9] Zeigler v. Coffin, 219 Ala. 586, 123 So. 22 (1929); Madden v. Keyser, 331 Ill. 643, 163 N. E. 424 (1928); Blume v. Hartman, 115 Pa. 32, 8 Atl. 219 (1887).

influence as would naturally cease with the death of the wife. But, on the other hand, in a case in which the first of testator's daughters represented to him that the second daughter had wronged her, did not love him, and did not deserve to participate in his estate, a prejudice thus formed in the testator's mind might well remain after the death of the first daughter.[10] In fact it is easily conceivable that such prejudice might be actually increased by the death of the daughter who pictured herself as having suffered at the hands of the other. In such situations, however, it is difficult to determine just when such influence no longer overwhelms the will but instead convinces the judgment and therefore ceases to be "undue."[11]

Whatever criticism may be made of the jury's handling of the facts in the principal case, the court's refusal to exclude evidence of the continuation of undue influence simply because of the intervening death of the person alleged to have exerted it, seems to present a sound policy not inimical to what is conceived to be the nature and effect of undue influence, nor inconsistent with the present rules concerning the proof thereof.

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[10] Penniston v. Kerrigan, 159 Ga. 345, 125 S. E. 795 (1924) cited note 1, *supra.*

[11] *Cf.* Henderson v. Jackson, 138 Ohio 326, 111 N. W. 821 (1907) (Testatrix unwillingly disinherited her heirs because she felt bound by a promise made her husband at his death four years previous to the making of the will. *Held,* not undue influence). But *cf.* Nelson v. Oldfield, 2 Vern. 76 (Ch. 1688) (Testatrix unwillingly disinherited her mother and sisters in favor of a stranger because of a previous oath she had been prevailed upon to make and which she "durst not [break] for fear of damnation." *Held,* undue influence).